No. 744.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth District

LUTHER CREASY,
Petitioner,

vs.

OHIO POWER COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

Respondent is satisfied with the presentation made by petitioner in this regard. While there was no formal opinion by the United States District Court for the Southern District of Ohio, Eastern Division, the Court made a formal statement to the jury before discharging it in explanation of his reasons for directing a verdict in favor of respondent. This statement is set forth in the appendix of respondent annexed hereto at pages 28-32.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether under the established law of the State of Ohio there is any duty of protection owed by one who engages the services of an independent contractor to its employee who is injured while working on live power lines, which work involves real inherent dangers, known and fully appreciated by such employee, and where the injury sustained is a direct incident to the ordinary performance of the employee's work on such power lines.

STATUTORY PROVISIONS

Petitioner has referred to Section 4113.04, Ohio Revised Code. While this section has no application in the instant case, reference is made in said section to Section 4113.03, which is appended hereto at page 32. Petitioner has set forth certain definitions contained in Section 4121.01. This section is part of the Workmen's Compensation Law of Ohio and has no application here. However, the same definitions are contained in Section 4101.01 with respect to the use of the defined terms in Sections 4101.01 through 4101.16, inclusive.

STATEMENT

Petitioner has filed a certified copy of the appendix record which was used in the Court of Appeals. The statement of the case by petitioner is essentially correct so far as it goes. Petitioner has obscured some of the facts determinative of the issues on the motion for a directed verdict at the close of the petitioner's case, and neglected to state other facts relied on by the trial judge and the Court of Appeals in entering judgment in favor of respondent.

The Court of Appeals has accurately set forth the material controlling facts in this case in its opinion which is set forth in its entirety in petitioner's appendix to which reference is made. We do not believe it necessary to encumber this brief with a repetition of the facts as stated therein. Petitioner, of course, knew, as did all employees of Hoosier. that all of the wires on the power lines were charged or energized carrying high voltage electric current into the Hicksville area and had experience working under such conditions (156a).

This case involves an action for the recovery of money damages resulting from injuries sustained by plaintiff due to the alleged negligence of respondent.

The Court of Appeals affirmed the action of the District Court in granting the respondent's motion for a directed verdict in its favor at the close of petitioner's case and entered judgment thereon. The basic question raised by the petition for writ of certiorari filed by petitioner is whether the Court of Appeals decided an important state question in conflict with the applicable law of the State of Ohio. Petitioner claims that it did and is therefore seeking to invoke the appellate jurisdiction of this Court under 28 U. S. C., Section 1254(1). Rule 19 of the Supreme Court Rules sets forth the primary considerations governing review on certiorari.

It is the position of respondent that (1) there is no important state question involved, and (2) the decision of the Court of Appeals is completely in accord, not conflict, with the applicable Ohio law. Petitioner is not claiming that the Court of Appeals overlooked or ignored the applicable Ohio decisions, but simply that both the Court of Appeals and the District Court, in exercising their judicial discretion and judgment, incorrectly applied the accepted law to the undisputed facts.

ARGUMENT

The Court of Appeals concluded that there was no violation by respondent of any duty owed to petitioner. In addition to the absence of any breach of duty owed to petitioner by respondent, the evidence presented at the trial clearly established that the proximate causes of petitioner's injuries were the following: his assumption of the risk of injury in the circumstances, the failure of petitioner's employer, an independent contractor, to enforce its written safety rules relative to work on live power lines, and the failure of petitioner to use the protective safety equipment furnished by his employer in the manner required by such safety rules, or even in accordance with an alleged practice of linemen contrary to the rules.

The District Court, in addition to finding no breach of duty, also found that petitioner was guilty of negligence which would prevent his recovery. The Court of Appeals decided the case solely upon the failure of petitioner to establish a duty owing to him and the breach of that duty by respondent, and therefore did not consider the question of petitioner's negligence. Respondent shall confine its remarks here solely to the question of the duty of respondent to petitioner. We believe the conclusion is unavoidable, applying the applicable Ohio law and reason, that the actions and decisions of the District Court and the Court of Appeals are correct.

The Court of Appeals, in its decision (Pet. App., pp. 6 and 8), relied upon the decisions of the Supreme Court of Ohio:

> "As in all questions of liability for negligent acts or omissions, the first consideration is whether the evidence discloses some fault on the part of the defendant leading proximately to the plaintiff's injury.

In the recent case of Ford Motor Company v. Tomlinson, 229 F. 2d 873, this court made a careful study of the standard of conduct which the Supreme Court of Ohio applies to one in the defendant's position toward the employee of an independent contractor working on his premises and found upon analysis of the recent decisions of that court that they have dealt primarily with the extent of the owner's duty to warn of a defective or dangerous condition within the knowledge of the owner and neither known by or obvious to the contractor's employee. We relied upon Schwarz v. General Electric Realty Company, 163 Ohio 354, Bosjnak v. Supreme Sheet Steel Company, 145 Ohio 538, Wellman v. East Ohio Gas Company, 160 Ohio 103 and Davis v. Charles Shutrump & Company, 140 Ohio 89.

* * *

The present case must be decided by the application of Ohio law and the Schwarz case, supra, seems to be the last pertinent expression of it in respect to the duty of the owner of premises to the employee of an independent contractor."

I

The Court of Appeals and District Court Correctly Applied the Applicable Ohio Law

In recent years the Supreme Court of Ohio has passed on questions concerning the liability of a principal employer to an employee of an independent contractor. That is the general question presented in this case. We shall refer to three Ohio Supreme Court decisions and one decision of this Court in some detail due to their importance in this case. We regard these decisions, particularly the one in the *Wellman* case, as being dispositive of the question of the *duty* of respondent herein.

In *Wellman v. The East Ohio Gas Co.*, 160 Ohio St., 103 (1953), plaintiff was employed as a welder's helper by

Fithian Contracting Co., an independent contractor, which, under a written contract with defendant, was laying a six-inch gas line. Defendant had its inspectors "on the job" to see that Fithian performed its work according to specifications. The employees of Fithian, including plaintiff, attached by nipple and saddle a section of six-inch pipe to the side of a portion of the twelve-inch pressure gas main. Thereafter, *employees of defendant*, either assisted by employees of Fithian or with such employees in close proximity, installed a gate valve in the six-inch pipe and drilled an opening into the twelve-inch main through the six-inch pipe, thereby releasing gas into the six-inch pipe as far as the closed gate valve. The open end of this six-inch section of pipe was closed by employees of Fithian through the application of a rubber gasketed metal cap secured to the pipe by bolts passed through fianges. To further secure the cap and prevent the escape of gas which might seep through the gate valve, the cap was strapped to the pipe by steel rods, the ends of which were welded to the pipe. As a Fithian employee, plaintiff assisted in welding the nipple and saddle on the twelve-inch main and in welding the steel rods over the end of the cap.

A pipe-fitter employed by Fithian under orders from his foreman removed the cap from the end of the six-inch pipe. During such process the cap blew off, due to the pressure of gas which had seeped through the gate valve, and struck plaintiff on the legs, causing the fracture of one of them. There was testimony strongly indicating that the pipe-fitter proceeded improperly in attempting to remove the cap in that he cut the iron rods strapping the cap before loosening the bolts to permit the escape of gas which might have accumulated behind the cap. Plaintiff insisted at trial that he had no previous experience with high-pressure gas mains and did not know and was

not informed by anyone that gas had passed into the six-inch pipe from the twelve-inch main. However, plaintiff's foreman and the welder who was plaintiff's immediate superior, both Fithian employees, were fully cognizant of the entire situation and the reasons for bolting and strapping the cap on the end of the six-inch pipe.

The action was against the East Ohio Gas Company. A verdict and judgment for plaintiff in the trial court, affirmed on appeal by the Court of Appeals, was reversed by the Supreme Court and final judgment rendered for the defendant.

In reference to the cases cited by plaintiff in the *Wellman* case relating to situations where an independent contractor and his employees were unaware and uninformed as to a dangerous condition on the premises created by the owner or of which he had knowledge, the court held that such cases were not applicable. In concluding that defendant's motion for a directed verdict at the close of all the evidence should have been sustained, it is stated at pages 107 and 108 of the opinion:

> "In the instant case, an entirely different situation is presented. Here, Fithian, an independent contractor, was engaged by the defendant to lay gas pipes for it. As an incident of such engagement, a pipe was attached to a high-pressure gas main and later capped, which project was carried out by employees of Fithian, including plaintiff, *as a part of the work they were hired to do. By the very nature of the work and what was done in performing it, Fithian, through its foreman and the welder, plaintiff's immediate superior, was fully aware that gas might enter the pipe past the gate valve and of the potential danger which plaintiff might encounter. In these circumstances, it was Fithian's duty to warn and protect the plaintiff, and no such duty devolved on defendant.*" (Emphasis added)

The first and second paragraphs of the court's syllabus read as follows:

> "Where an independent contractor undertakes to do work for another, in the *very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work*, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor.
>
> "One who engages an independent contractor to do work for him ordinarily *owes no duty of protection* to the employees of such contractor, *in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance.*" (Emphasis added)

The fact situation presented in the *Wellman* case is remarkably similar to the instant case. Actually the *Wellman* case was a much stronger case for the plaintiff as there the plaintiff denied knowledge of the potentially dangerous condition, and further, he was completely innocent with respect to the immediate cause of the accident, i.e. he was standing by when the cap blew off and struck his leg. But, it was held by the Supreme Court of Ohio that where the very doing of the work involved potential dangers known to the injured employee's employer (the independent contractor) then there is no duty respecting such dangers owed to the injured employee by the principal employer. *In such circumstances it is the duty of the independent contractor to take the necessary steps to protect his own employees from injury.*

The independent contractor and his employees, in the *Wellman* case, were engaged in laying a six-inch gas line for the gas company along Belle Vista Avenue in Youngstown to be connected with a twelve-inch high pressure gas main belonging to defendant which extended along Maho-

ning Avenue; in the instant case the independent contractor and his employees were engaged in installing a power line for defendant power company along the railroad right of way outside of Hicksville. In the *Wellman* case *the defendant actually participated in the work* with respect to the installation of the gate valve in the section of six-inch pipe (it was the pressure of gas, having seeped through the gate valve, which caused the cap to blow off). The facts concerning control of the work area by the employer of the independent contractor are similar, if not identical, in both situations. In one case the danger was created by the presence of gas pressure, and in the other the danger was created by the presence of electric current transmitted by a wire. In the *Wellman* case the plaintiff was completely innocent with respect to the actual occurrence of the injury, whereas here the failure of petitioner and his employer to exercise due care was the immediate and direct cause of petitioner's injuries. Also, in both cases the defendant had an inspector or engineer at the place of work to see that the work was being done according to specifications. In the instant case Hoosier Engineering Company, its foreman and supervisors, as well as petitioner himself, proceeded with the work knowing and appreciating the condition of danger surrounding its performance; whereas in the cited case plaintiff denied such knowledge. Finally, and of greatest significance, is the fact that in both cases the potential danger was inherent in, and incident to, the ordinary performance of the work itself. The danger would exist in both cases no matter where the particular work involved was to be done. The surrounding work conditions or locale had absolutely nothing to do with either case—the danger was inherent in the work itself and would be present regardless of where the *place* of such work might be.

The court in the *Wellman* case rejected the application of *Bosjnak v. Superior Sheet Steel Co.*, 145 Ohio St., 538 (1945), relied upon by petitioner, where the dangerous condition of the premises was *unknown by* and *not obvious* to the invitee and where the employer of the independent contractor retained possession and control of the work area and actively participated in the work.

The second Ohio Supreme Court case relied upon by respondent is *Schwarz v. General Electric*, 163 Ohio St., 354 (1955). The first two paragraphs of the court's syllabus read as follows:

> "Where an owner of premises engages an independent contractor to do work thereon, an employee of the contractor while performing the work is on the premises impliedly as an invitee of the owner, and the owner owes the employee the duty of exercising ordinary care to maintain the premises in a *reasonably safe condition* for use, *this duty not extending, however, to any inherent hazards necessarily present because of the character of the work to be done.*
>
> "The rule that an owner must keep his premises in a reasonably safe condition for an independent contractor and his employees while performing thereon the work for which they are employed by the owner *does not apply to a hazard created by negligent operation by the independent contractor or his employees.*" (Emphasis added)

Duffy Construction Company was employed by defendant to do structural work at the plant, and as an incident thereto, to unload a carload of steel beams by means of a crane with a 45-foot boom with cables attached, the beams to be swung from the car for placement directly under a high voltage power line 36 feet above the ground and supported in position by poles. The high tension line was owned and operated by an electric company. The defendant designated the unloading site for the beams after Duffy

had leveled off and prepared the bed upon which the beams were to rest. The operation was entirely within the control of Duffy.

The foreman of the iron workers of Duffy knew of the presence of the power line and its potential danger. The proposed operation was recognized as a dangerous one by all parties concerned except the plaintiff who claimed that he had not seen the high tension line or been advised of its potential danger although he was working directly under the line when the accident happened.

The plaintiff was an iron worker of many years experience and was accustomed to working with cranes around high tension wires. This electric power line was of such size and construction that it should have been obvious to anyone in the immediate vicinity. Other Duffy employees testified that working with heavy equipment in proximity to high tension wires was common practice in construction work, and presented a well known hazard. There was no claim that the high tension line was improperly constructed or that it was out of repair.

Plaintiff was injured when the steel cables of the crane were swung too close to the high tension wires, with the result that the cables came in contact with the wires and plaintiff was severely injured by the current escaping from the line through the beam and cables. Duffy was in sole charge of the crane, and the immediate cause of the accident was the negligent operation of the crane by one of its employees. The trial court sustained defendant's motion for a directed verdict, plaintiff's motion for new trial was overruled, the Court of Appeals affirmed the judgment of the Common Pleas Court, and the Supreme Court of Ohio, allowing plaintiff's motion to certify, affirmed the judgment of the Court of Appeals.

Defendant claimed that since the plaintiff was employed by an independent contractor in the performance of a contract with defendant and the contractor had knowledge of the real and potential dangers surrounding the performance of the contract, the duty to protect the plaintiff and its other employees from injury was the duty of the independent contractor and not the duty of the defendant, and second, that the proximate cause of plaintiff's injury was the negligent conduct of the plaintiff himself and other employees of the independent contractor. The court found in favor of defendant in respect to both contentions.

In the instant case, as in the *Schwarz* case above, respondent was not in control of the work area and did not participate in the work; the condition which resulted in petitioner's injury was a hazard necessarily present because of the character of the work to be done of which Hoosier Engineering Company and its employees, including plaintiff, were well aware; and the condition became dangerous through the negligence of another employee of the independent contractor in the *Schwarz* case and through the negligence of the independent contractor and petitioner in the instant case.

The court, speaking through Judge Hart, distinguishes the *Bosjnak* case at page 360:

> "It is apparent that this court in the *Wellman case* limited the rule, earlier announced in the *Bosjnak case*, to cases where the independent contractor and his employees enter upon the premises of the contractor's employer as his invitees, *unaware and uninformed of hidden dangers on the premises which had been created by the employer or of which he had full knowledge.* Here Duffy and its employees had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care, under the circumstances, which proximately caused plaintiff's injury." (Emphasis added)

In *Davis v. Shutrump Co.*, 140 Ohio St., 89 (1942), the premises owner controlled not only the instrumentality that caused the injury, but also the entire premises on which the injury occurred. The first syllabus states the Ohio law to be that:

> "Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while the work is in the course of performance, a servant of the contractor is an invitee and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, *only if the principal employer has, and the servant has not, actual or constructive notice of the existence of such condition.*" (Emphasis added)

The *Schwarz* case extended the rule of *Davis v. Shutrump* to cases where only the independent contractor had knowledge of the danger or hazard without regard to actual knowledge by the injured employee himself, the duty of warning and protecting the employee then being upon the contractor and not upon the principal employer.

In *Davis v. Shutrump*, J. Hart speaking for the Court, states at page 93:

> "The very nature of the undertaking required what was done to be done, and it necessarily exposed the plaintiff and all the employees of the several contractors working on the various parts of the construction to the hazards naturally incident to this type of construction."

In concluding that the city (the principal employer) violated no duty owed to plaintiff, it is stated by J. Hart at page 95:

> "Since in this case the plaintiff possessed a full realization of the dangers surrounding his place of employment, which dangers, if any, were created as a

> result of the prosecution of the work by independent contractors, one of whom was plaintiff's employer, and since the city of Youngstown had no right or authority to direct the methods by which the work was to be performed, the city violated no duty to the plaintiff in that respect and cannot be held liable on the theory that it must provide him a safe place to work."

Petitioner makes the surprising statement at page 9 of his petition that the cases which the Court of Appeals relied upon in affirming judgment for respondent erroneously apply Ohio law, yet these cases are the unmodified decisions of the Supreme Court of Ohio, which, together with state statutes, constitute the substantive law of Ohio. It would seem that the petitioner's real complaint is with the Ohio law.

The above decisions of the Ohio Supreme Court provide the statement and application of the principles of law which are controlling here and which were correctly followed and applied by the Court of Appeals.

These same principles of law were applied by the Sixth Circuit in *Ford Motor Co. v. Tomlinson*, 229 Fed. (2d), 873 (1956).

Tomlinson brought an action for injuries he sustained while working as a painter in a plant under construction on the defendant Ford Motor Company's property near Cleveland, Ohio. Tomlinson was the employee of a painting contractor and was injured when the platform on which he was working was knocked down by an employee of another independent contractor both of whom were engaged in constructing the plant for the defendant. Plaintiff was engaged in painting an overhead sprinkler system while another independent contractor was engaged in laying wood block flooring. The manner in which the accident

occurred is aptly described in the following two paragraphs of the opinion of Judge Stewart at page 874:

> "While this painting work was in progress overhead, the employees of Jennison-Wright were installing wood block flooring in the same area of the plant. The wood blocks were brought to the place where they were needed in the plant area by a dump truck. This truck was operated and owned by Alfonso Ruffin, who had been hired by Jennison-Wright on an hourly basis. As the work progressed, Ruffin was told by the Jennison-Wright employees where to dump each load of wood blocks.
>
> "While the plaintiff and his fellow worker were thus engaged in painting the sprinkler pipes above, Ruffin's dump truck was, at the direction of the Jennison-Wright employees, spotted in a position not far from a point directly below one end of their scaffold. In order to unload the wood blocks, Ruffin raised the dump body to its maximum height of nearly thirteen feet above floor level and moved the truck forward quickly. The truck's elevated body snagged the loop of rope hanging from the end of the scaffold, pulled the scaffold down and caused the plaintiff to fall to the floor."

Ford was charged with negligence in failing to provide a safe place of employment, and in failing to warn those working at floor level of the work going on overhead or to take steps to avoid the simultaneous progress of the overhead painting and the floor laying in the same area of the plant. There was sufficient evidence to support a finding that it was Ford who had arranged for the sprinkler painting and floor laying operations to proceed simultaneously in the same area of the plant and that this had been done under the powers reserved to it in its prime contract with The H. K. Ferguson Company, the prime contractor for the erection of the plant. Judge Stewart states the basis of the plaintiff's argument as follows at pages 877 and 878:

> "Ford's liability was based upon its alleged independent negligence in directing that the painting and

> floor laying work proceed simultaneously, without taking any steps to warn against dangers implicit in the dual operation."

Ford argued that Sections 4101.11 and 4101.12 of the Revised Code imposed no liability upon it to the plaintiff, and that the plaintiff had actual or constructive knowledge of all the conditions which combined to cause his injuries and was therefore barred from asserting a claim against Ford. The Sixth Circuit held that it was error for the District Court to submit the question of Ford's liability to the jury, that Ford violated no duty to the plaintiff under the law of Ohio including the noted "frequenter" statutes, and that judgment should be entered in favor of the defendant.

The Sixth Circuit noted and discussed the cases relied upon by respondent herein, Judge Stewart commenting upon the *Schwarz* case at page 880 as follows:

> "In that case the contractor's employee was injured when a crane with which he and fellow workers were unloading steel came in contact with an electric power line. The immediate cause of the accident was the negligence of one of the contractor's other employees. The plaintiff stated that he had not seen the wire and had not been warned of its potential danger. *The court held that the defendant owner had performed its duty of exercising ordinary care by having previously warned the plaintiff's employer that the power line was energized.*" (Emphasis added)

The conclusion of the Sixth Circuit that the reason there was no duty owing by defendant to plaintiff with respect to the condition of danger created by its own affirmative action is stated clearly in the opinion at page 880 as follows:

> "There was no hidden defect or danger here. That the work of laying the flooring was proceeding simultaneously with the overhead painting was a fact as

obvious to the plaintiff as to Ford. Indeed, both the plaintiff and his foreman stated that they had observed the floor laying work in progress.

* * *

"In the present case, since the simultaneous progress of the painting and floor laying was obvious, there was as we have said no duty to warn the plaintiff of the situation. * * *"

The four cases noted above may be briefly summarized as follows:

Wellman v. East Ohio Gas Co.

Inherent potential danger incident to very performance of work; plaintiff denied knowledge of dangerous condition; held duty of independent contractor to warn and protect its employee and not that of principal employer.

Schwarz v. General Electric

Potential danger created by the direction of work by the resident engineer of the principal employer; plaintiff denied knowledge of the conditions; held defendant performed its duty by warning plaintiff's employer that the power line involved was energized.

Ford v. Tomlinson

Potential condition of danger (simultaneous progress of painting and floor laying) created by direction of principal employer which was open and obvious; held employer violated no duty to plaintiff under the law of Ohio.

Davis v. Shutrump Co.

Inherently dangerous condition incident to the type of work created on premises of principal employer which was fully known by employee of independent contractor; held defendant violated no duty to plaintiff.

How do the facts of the instant case compare with those in the above cases?

1. The potential danger here was one inherent in the performance of the work; it was necessarily incident to

the carrying on of the work, as in *Wellman v. East Ohio Gas Co.*

2. Defendant did not create the hazard or danger alleged by plaintiff to have proximately caused his injuries.

3. The condition was not hidden or concealed, but was open and obvious, as in *Ford v. Tomlinson*, only more so.

4. Plaintiff was fully and completely aware of the dangerous condition, which fact was denied by the plaintiff in the *Wellman* and *Schwarz* cases, and also apparently in *Ford v. Tomlinson.*

5. Defendant had no control over the place of work, the work itself, or the manner or method of doing the work by the employees of the independent contractor, as was true in all of the above cases.

Petitioner relies upon two decisions of the Ohio Supreme Court, both of which were decided before *Wellman v. East Ohio Gas Co., Schwarz v. General Electric* and *Ford v. Tomlinson.* The cases relied upon are *Bosjnak v. Superior Sheet Steel*, 145 Ohio St., 538 (1945), and *Hozian v. Crucible Steel Casting Co.*, 132 Ohio St., 453 (1937). The application of the *Bosjnak* case was urged by the plaintiff in both the *Wellman* and *Schwarz* cases and was rejected for the reason that the dangerous condition of the premises there involved was *hidden* and was *unknown by* and *not obvious to* the employee. Further, in that case the employer of the independent contractor retained possession and control of the work area and actively participated in the work, neither of which was involved in the instant case.

The *Hozian* case is clearly distinguishable from not only the instant case, but all the other cases noted above. The Court there held that it was error to direct a verdict in favor of the defendant where the plaintiff, an employee of an independent contractor, was struck and injured by a traveling crane on an elevated track, while engaged in

washing windows on defendant's premises in close proximity to the track, where testimony was proffered that one in apparent control of defendant's activities on the premises told the foreman of plaintiff's employer that the operation of the crane would be suspended during the progress of the window washing.

Petitioner refers to the decision of the Sixth Circuit in *U. S. Steel Co. v. Olewinski*, 235 Fed. (2d), 326 (1956). The substantive law of Ohio, of course, is found in the Ohio statutes and the pronouncements of the Ohio Supreme Court, and not the interpretation by a federal court of such law. The propriety of the *Olewinski* case, and whether the substantive law of Ohio was correctly applied there, is not the question here. The only question raised here is whether the Sixth Circuit decided this case, not some other case, in accordance with the applicable Ohio law. Further, the controlling facts in the *Olewinski* case are not set forth in the court's opinion, thereby making it difficult to determine the basis of the court's decision and equally difficult for the petitioner or anyone else to place any reliance on the decision one way or the other. The court refers to the controlling Ohio decisions in its opinion, and although it does not recite the facts involved, it is certainly to be assumed that the court correctly applied the Ohio law.

Petitioner claims further, at page 11 of his petition, that it was shown that he was ordered to climb the pole by respondent's "on the job" engineer, thereby bringing "petitioner within the protection of Ohio law and specifically created a jury question." The only authority cited by petitioner in support of this argument are Ohio decisions which state a rule of law relating to the affirmative defense of assumption of risk by an injured party who performs an act at the direction of his employer. This, of course, is

irrelevant to the question of the duty of respondent to petitioner, which was the basis of the decision of the Court of Appeals. Petitioner's claim in this respect is otherwise completely unsupported.

Petitioner urges the so-called Ohio "frequenter" statutes (Sections 4101.11 and 4101.12, Ohio Revised Code) as being the basis of respondent's liability. These statutes, so far as relevant here, provide:

4101.11:

> "Every employer * * * shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof * * *"

4101.12:

> "No employer shall * * * suffer any employee to go or be in any * * * place of employment which is not safe * * * No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

Petitioner also refers to Section 4121.01, which is part of the workmen's compensation laws of Ohio and has no application here. Reference is also made to Section 4113.04, Ohio Revised Code, which is the apparent basis of number 4 of the questions presented at page 2 of petitioner's petition and set out in full at page 16. It is not referred to elsewhere and no reasons are suggested and no authority cited in respect to the application of this statute to the instant case. The language "or one who controls the place of employment," stated in petitioner's question 4, does not appear in Section 4113.04. This section, besides being otherwise inapplicable here, by its express language relates only to actions brought by an em-

ployee against his employer as described in Section 4113.03. This latter section, dealing with the fellow servant rule, refers to an action brought by an employee to recover from his employer for personal injuries suffered "while in the employ of such employer," thus referring to the usual employer-employee relationship. The employer-employee relationship here, of course, was between petitioner and Hoosier Engineering Co., and not between petitioner and respondent. Because of the Ohio workmen's compensation laws, with which all employers who employ three or more persons are required to comply, this and certain other provisions of Chapter 4113 of the Ohio Revised Code are infrequently applied. As a matter of fact petitioner received full workmen's compensation benefits under the Workmen's Compensation Act of Ohio.

With respect to the "frequenter" statutes, it is apparent that such statutes impose no greater or different duty upon respondent in this case than that imposed by the common law, notwithstanding the serious doubt as to whether such statutes apply to the employees of an independent contractor doing work under the circumstances of this case.

It is noted that the statutes were not even mentioned in the opinions of the Ohio Supreme Court in the recent *Wellman* and *Schwarz* cases. In *Bosjnak v. Superior Sheet Steel Co.*, where the Supreme Court of Ohio did specifically consider and discuss the statutes, the Court defined the duty of the principal employer in the first paragraph of its syllabus as follows:

> "An employee of an independent contractor, while engaged in the erection of a building upon premises, the possession and control of which are retained by the owner, is an invitee to whom the owner owes the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use in a manner

> consistent with the invitation, and to inform the invitee of hazardous conditions of the premises and of activities thereon unknown by and not obvious to the invitee."

Matthias, J., in the *Bosjnak* case, after referring to the trial court's charge on the statutes which consisted of reading the statutes and then instructing the jury that they were to determine whether the defendant exercised reasonable care in compliance with the statutory requirements, states at page 550 in finding error in such charge:

> "The court, after quoting in full the provisions prescribing general rules of conduct, failed to call attention to the provisions of the statute essential to a correct consideration and application of the provisions read, and without which the instructions given were prejudicially erroneous.
>
> "Subsection 11 of Section 871-13, General Code, provides as follows:
>
> " 'The terms "safe," and "safety," as applied to any employment or a place of employment shall mean such freedom from danger to the life, health, safety or welfare of employees or frequenters as the nature of the employment will reasonably permit * * *.'
>
> "It is obvious that the words 'safe' and 'safety,' as thus defined, have a much more restricted meaning than would ordinarily be accredited them. These provisions, when considered and construed together, do not create an absolute duty or unconditional liability or constitute the employer an insurer."

Subsection 11 of Section 871-13, General Code, is now Subsection (K) of Section 4101.01, Ohio Revised Code. The definition contained therein really means nothing more than that defendant owes a duty to plaintiff to exercise ordinary care under the circumstances.

Thus, it makes no difference whether the statutes are or are not applied here. The question of the legal liability of defendant will be determined on the basis of the same

standards of conduct with or without the statutes. In other words, as applied to this situation, the statutes simply represent a codification of the common law. Such was the conclusion of the Sixth Circuit in *Ford Motor Company v. Tomlinson* at page 879:

> "* * * The simple fact seems to be that, at least with respect to 'frequenters,' the Ohio appellate courts have *not* regarded those statutes as exacting a duty substantially *different* from that imposed generally by Ohio law upon an owner of property towards an invitee. * * * Our attention has been called to no case where an appellate court in Ohio has held that *the statutes* here involved either *added* to or *detracted* from the duty of exercising ordinary care which a property owner owes to an invitee." (Emphasis added)

Petitioner does not suggest what duty is imposed upon respondent in this situation by the "frequenter" statutes which is not also required by the common law as stated and applied in the several decisions of the Ohio Supreme Court previously noted and as applied by the Court of Appeals in this case.

As a matter of fact, the Ohio Supreme Court has never held any of the safety statutes as being a basis for imposing liability in this type of fact situation. The same fact pattern was present in the *Wellman* and *Schwarz* cases and the statutes were not even mentioned by the Ohio Supreme Court, although the Court would take judicial notice of such statutes and apply any that were relevant. Thus, the substantive law of the State of Ohio on this point is clear, and was followed by the Court of Appeals.

II

There is No Question of Denial of Petitioner's Right of Jury Trial

Petitioner claims that the District Court and Court of Appeals deprived him of a trial by jury contrary to the provisions of the Seventh Amendment to the United States Constitution. Although this argument was not even made to the Court of Appeals, and is being made now for the first time, it is so specious as to hardly merit comment. It is obviously true that the right of trial by jury is guaranteed to all citizens by the United States Constitution as well as the Constitution of the State of Ohio and cannot be invaded or violated by judicial decree. It is also true, however, that this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Neither of the cases cited by petitioner so hold, but recognize that the issues of negligence in a case of this kind must be submitted to a jury only where reasonable evidence has been presented in reference to the issues which is legally sufficient to make a prima facie case. Obviously, there is no question here of denial of right to trial by jury. The question simply is whether, under the evidence and the applicable Ohio law, the issues in this case should have been submitted to the jury.

III

There is No Important State Question Presented

There is no grounds for certiorari here for the further reason that the decision of the Court of Appeals in this case did not involve an important state question. The question decided by the Court of Appeals involving the duty of respondent under the circumstances of this case was based upon the application of the settled governing principles of law as announced by the Ohio Supreme Court to the particular facts of this case. There is no principle of Ohio law involved which requires settlement. There is no question of importance to the public. It is important only to the parties. Principally, the petitioner argues that his evidence was sufficient to make a prima facie case, to raise a jury issue. Both the District Court and the Court of Appeals found that it was legally insufficient and therefore held that a verdict in favor of respondent should be directed and judgment entered thereon. Certiorari jurisdiction was not conferred upon and has not been exercised by this Court merely to give the defeated party in the Court of Appeals another hearing.

CONCLUSION

The decision of the Court of Appeals is in complete accord with the pertinent and authoritative decisions of the Ohio Supreme Court which are conclusive of the basic issue respecting the duty of respondent to petitioner involved here.

The Supreme Court of Ohio on several occasions has clearly held that as to an employee of an independent con-

tractor engaged in work on an instrumentality, the very doing of which involved real inherent dangers, who is injured as a direct incident to the ordinary performance of his work on such instrumentality, there is no duty owed to such employee by the principal employer; and further, that a principal employer owes no duty of protection to an employee of such independent contractor with respect to a real or potential danger "in connection with the execution of the work" and "surrounding its performance" when the independent contractor or the injured employee has notice of and is aware of such danger.

In the instant case the very work undertaken by Hoosier Engineering Company, the independent contractor, involved elements of real or potential danger which there was no practicable means for respondent to avoid. Petitioner was injured by the very instrumentality which was the subject of the independent contractor's work, over which the independent contractor had control and on which petitioner was working. Respondent had no control over the work area, or the method or manner of the performance of the work, and did not in any manner actively participate in the work. All that respondent did was to furnish certain materials to be erected and installed by petitioner's employer. To impose liability on respondent in this situation would make it an insurer. There was nothing, absolutely nothing, that respondent, in the exercise of ordinary care, could have done to avoid the injuries sustained by petitioner. *The dangerous conditions here were necessarily included in and a part of the work place.* There was only one thing which could have resulted in the avoidance of the injuries sustained by the petitioner, to-wit, compliance with the safety rules and regulations of the Hoosier Engineering Company and the Union by Hoosier

and the petitioner. Such safety rules and regulations were disregarded.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF DISTRICT COURT TO JURY

The Court: Ladies and gentlemen of the jury, some of you were on my jury the other day when I informed you that at the close of every case there arises a question of law where the court must decide upon the sufficiency of the plaintiff's case as a matter of law. Such a question has arisen in this case. It has, as a matter of fact, been anticipated by me almost from the inception of the case.

The court has duties to perform and juries where they hear cases or sit in deliberation on cases, have duties to perform. These duties are not always the most pleasant duties that we are called on to perform.

The American courts are great institutions. They are open at all times to all persons to file actions in cases in which that particular court has jurisdiction, in which they may seek redress of wrongs. There is no screening process or no point at which it can be determined that one case not be filed or that it should be filed, and that screening process comes only at a point like this in the trial and then this court must determine, as a matter of law, whether or not there is sufficient basis for the case to go to the jury.

I share with you what I know to be your natural sympathies in this case. The plaintiff in this case has been seriously and permanently injured through the accident that occurred here. Your sympathies may be somewhat alleviated, if you understand that the plaintiff was working for the Hoosier Engineering Company and that that company was compelled to and did subscribe to the workmen's insurance fund, which is known as the Workmen's Compensation Act.

So the plaintiff in this case has been compensated to the extent that is provided for in the Workmen's Compensation Act.

I merely mention that so when you leave here you will understand that and know that. If the defendant in this case were negligent and had caused the plaintiff's injuries, the fact that he had received workmen's compensation, would have no effect in this case and would not be a matter to be taken into consideration in your judgment or in your verdict. I desire to leave that thought with you.

Now, legally the situation is in this case that the Hoosier Engineering Company is what is known as an independent contractor and the Ohio Power Company is what you might term the owner in this case, and it had made a contract with the Hoosier Engineering Company to do this installation, and so the plaintiff in this case was working for the Hoosier Engineering Company in assisting it in performing its contract. Being injured while in the employ of the Hoosier Engineering Company, he, as I have said before, was entitled to workmen's compensation. But the Ohio Power Company could only be liable in the event that it had done some negligent act, that is, committed some act of negligence which had resulted in the plaintiff's injuries.

I have searched the evidence carefully, and the claim made by the plaintiff is that the defendant, Ohio Power Company, furnished the material, furnished a pole and crossarm which had been creosoted. That seems to be the standard practice for utility companies to use creosoted poles and crossarms for preservation of their equipment. While, if that is wrong, they would not be justified in doing it, at the same time long practice that is so universally done, raises a very grave question as to whether or not the court should say they should not do that and all over the country they would have to stop creosoting their equipment.

But the essential element of this case is, that an owner company is not liable for work done by an independent contractor unless it has committed some negligence, and in order to commit negligence, it must be some act that it does that is not open and obvious to the plaintiff and the company that he is working for.

Here the plaintiff had been a lineman for 22 years. The Hoosier Engineering Company knew that those poles were creosoted, that the crossarms were creosoted. They knew what happened in hot weather, that it gets sticky perhaps, and soft and they knew that these wires were hot wires, so to speak, and loaded with high voltage electricity, and the plaintiff and Hoosier Engineering Company knew just about as much about this particular job as the Ohio Power Company.

So, the court cannot find that there is any negligence on the part of the Ohio Power Company.

There are many cases on this subject and I have been reading these cases and examining them since the progress of this trial, and the court is of the opinion from any number of these cases, this case must be decided on the cases in Ohio.

Here is a case that was decided rather recently, in May of 1955, by the Supreme Court of Ohio, in which they announce the rule this way:

"It is apparent that this court in the Wellman case limited the rule, earlier announced in the Bosjnak case, to cases where the independent contractor and his employees enter upon the premises of the contractor's employer as his invitees, unaware and uninformed of hidden dangers on the premises which had been created by the employer or of which he had full knowledge. Here Duffy and its employees had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care,

under the circumstances, which proximately caused plaintiff's injury. It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractor. It was the independent contractor's and not the owner's operation, and it was entirely under the supervision and control of the former."

While there are many cases which announces the rule and the court understands the rule to be, in order to hold the Ohio Power Company, there must be something in the nature of a hidden nature, a latent defect or something that would not be obvious to the plaintiff.

Then, there is a further matter. The court does not desire to attribute any fault to the plaintiff unnecessarily, but I think the rules, as they have been brought out here, require the plaintiff to put on his leather equipment when he reached the point of primary area, which would be immediately under the wires and not go up through them. The court finds also that the plaintiff was guilty of contributory negligence or negligence which would prevent his recovery.

You have sat here three days now and listened to the evidence in this case. I know you have sat sympathetically and interestedly and I felt that I owed you this explanation of what was happening to the case and I am sustaining a motion of the defendant for a directed verdict or for a judgment, and in this case I am going to order the judgment entered be in favor of the defendant without requiring the jurors to sign a verdict.

This will conclude this case and you will now be excused from this particular service and we have other jurors coming in on Monday, so you will have a little time here with-

out being called. I am not sure when you will be called again, but probably in the not too distant future you will be called. I expect to be here for a couple of weeks.

Adjourn court.

APPENDIX B

SECTION 4113.03, OHIO REVISED CODE

In all actions brought to recover from an employer for personal injuries suffered by his employee or for death resulting to such employee from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employees, it shall be held in addition to any other liability existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employee of such employer, is not the fellow servant, but superior to such other employee; any person in the employ of such employer in any way having charge or control of employees in any separate branch or department shall be held to be the superior and not the fellow servant of all employees in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or inspect the ways, works, boats, wharves, plant, machinery, appliances, or tools, in any way connected with or in any way used in the business of the employer, or to receive, give, or transmit any signal, instruction, or warning to or for such employees, shall be held to be the superior and not the fellow servant of such other employees of such employer.